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Labor and Employment Hot Topics of 2020

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Matthew F. Nieman is a Principal and the Litigation Manager in the Washington, D.C. Region office of Jackson Lewis P.C.

Mr. Nieman represents employers in a broad spectrum of labor and employment law matters, including discrimination, wage and hour, questions related to the Uniformed Services Employment and Re-employment Rights Act of 1994 ("USERRA"), and workplace drug-testing issues. He is actively involved in all phases of the litigation process on the full range of employment discrimination and employment-related tort and contract claims, including the representation of employers in actions before the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and various state and local agencies.

As part of his litigation practice, he has concluded many employment-related adversarial proceedings, including solo trials and multiple jury trial defense-verdicts. He has additionally drafted numerous successful dispositive and summary judgment motions in state and federal courts throughout the Mid-Atlantic region.

Mr. Nieman is a frequent writer and speaker and provides training to employer groups on various workplace-related topics, including sexual harassment, discrimination, substance-abuse prevention, and litigation avoidance.

Prior to entering private practice, Mr. Nieman served as an active-duty U.S. Army Judge Advocate ("JAG") at Fort Benning, Georgia and at Camp Liberty, Baghdad, Iraq. During his service as an Army JAG, Mr. Nieman enjoyed unique opportunities to interact with state and local governments in both the criminal and civil arenas as well as to develop trial experience.

Mr. Nieman earned his B.S. in Industrial & Labor Relations from Cornell University and his J.D. from the College of William & Mary Marshall-Wythe School of Law.

Mr. Nieman is recognized in the 2021 Edition of *The Best Lawyers in America*.

Tom Pinder

Tom Pinder is Deputy General Counsel at American Bankers Association.

He has over 20 years of experience specializing in banking and finance with extensive experience litigating publicly prominent cases. He currently oversees ABA's amicus practice and supervises all litigation and advocacy projects, HR and FEC compliance.

Prior to ABA, Tom was an enforcement attorney for the FDIC, Trial Attorney for the Department of Justice, Assistant State's Attorney in Montgomery County, Maryland, and a Trial Defense Attorney for the Judge Advocate General's Corps of the U.S. Army.

He received his B.A. from Rutgers College and his J.D. from New York University School of Law.

He is currently Vice Chair of the American Bar Association's Banking Law Section.

One Thing Before We Get Started…

Jackson Lewis P.C. has prepared the materials contained in this presentation for the participants' reference and general information in connection with education seminars presented by the firm and its attorneys. Attendees should consult with counsel before taking any actions that could affect their legal rights and should not consider these materials or discussions about these materials to be legal or other advice regarding any specific matter.

Staffing Changes To Stay Nimble

Some of my team members have requested flexible hours because their children will be learning from home. What am I able to offer and what cautions should I be aware of?

How do I balance a policy that treats everyone the same (equality) vs. taking an opportunity that recognizes certain employees need certain supports (equity)?

We are thinking about furloughing our employees for the rest of the calendar year until we know our revenue will pick back up again.

What cautions do you have for me on this approach?

Staffing Changes to Stay Nimble

Employers have considered a number of options to reduce workforce costs.

- Modification of scheduling and duties
- Reducing hours and pay and Workshare options
- Furloughs and Terminations
  - Warn Act Requirements
- Recall to Work Considerations

Workshare Programs

What is a Workshare Program anyway?

- Reduce hours and pay temporarily for some or all – even exempts (with caution)
- Affected employees become eligible for partial unemployment benefits, enabling them to recoup some lost pay
  - Employees keep jobs, receive unemployment, no requirement to look for another job
  - Employers keep their employees and reduce costs
- 27 states
- Employers have to apply
- Certain requirements
- Employees receive the state-specific, calculated CARES Act unemployment benefits
- Potential implications on loan forgiveness (as applicable)

Furloughs and Terminations

- Benefits of furlough:
  - Reduces likelihood workers will seek other employment
  - Employees may be able to remain on benefits (must check specific plan)
  - Employees will still be able to collect unemployment insurance benefits
  - In some states, a final paycheck is not required and/or PTO does not have to be paid out
- Drawback of furlough:
  - Potential wage/hour liability if employee performs any work while furloughed
  - Must track to make sure employees are returned to work within 6 months so as to avoid WARN obligations

Furloughs and Terminations

- Furlough- employee remains employed but isn't give work for a period of time
  - temporary layoff, temporary leave, inactive status, "on reserve"
- Termination- the employment relationship is over
  - a/k/a layoffs, reductions in force or "RIFs"

Furloughs and Terminations

Warn Act – Federal and State Specific Requirements

- Warn Act - law that protects workers from the impacts of unexpected loss of employment by requiring employers to give notice to employees.
  - Defines loss of employment as employment termination, a layoff exceeding six months or the reduction of working hours by 50% in six months.
- 60-day notice required when:
  - Closing a facility will lead to loss of employment for at least 50 employees
  - At least 500 employees who work on site for 30 days will be laid off (employees laid off should comprise at least 33% of actively working employees at the employer's site)
  - Does not apply to employees who are employed for 20 hours a week or less, or employees who have been employed less than six months

Furloughs and Terminations

Warn Act – Federal and State Specific Requirements

- If layoff will be for fewer than 6 months and a definite return to work date is provided, then no WARN
  - If WARN does (or might) apply, consider "unforeseeable business circumstance exception"
  - **Continuous inquiry** – send notices as soon as becomes more foreseeable
- State specific Notice Requirements? Many states have their own "mini-WARN" acts.

Furloughs and Terminations

What else do you need to consider?

- Selection criteria, disparate impact
- Impact on employees on work visas
- Impact on benefits – COBRA notices
- Consider whether severance is mandatory (plan, policy) or an option
  - OWBPA for 40+ severance agreements
  - Other severance agreement requirements
- If temporary, unpaid, but subject to exempt employee: pay for full work-week in any week they work
- “Final” pay requirements
  - Depending on state, may have to pay-out accrued paid time off/vacation

Modifications of Scheduling and Duties

- Adjust employee schedules as needed
  - Split-shifts
  - Staggered breaks and scheduling
  - Group scheduling
- Temporarily reassign, reconfigure job duties

Reductions in Hours and Pay

What do you need to consider?

- Wage notice requirements
- FLSA and state wage and hour laws still apply
- Non-exempt employees:
  - Wages cannot drop below minimum wage (federal and state)
  - Must still be paid overtime
- Exempt employees:
  - Threshold minimum weekly wage must still be met (federal and state)
  - Failure to meet the thresholds risks compromising the exempt status and triggering requirement to pay overtime ($35,568 or $684/week)
  - Consider converting to hourly, non-exempt

Reductions in Hours and Pay

What do you need to consider?

- Wage and salary changes should be made one-time and be prospective, not retroactive or manipulative to avoid loss of exempt status
- Possible benefits impact
- May be unemployment eligible pursuant to CARES Act – but, up to particular state and determined by applicable state agency
- Communicate wage and salary reductions in writing
- Employees are not required to accept reductions in pay
- Assumes no CBA, contract, policy provides otherwise

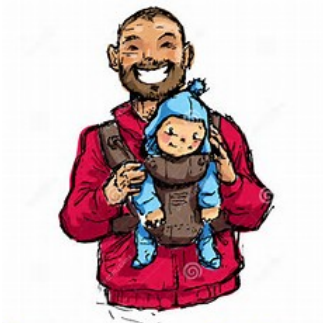
Paid & Parental Leave

DC Paid Leave

- The District of Columbia Universal Paid Leave Amendment Act of 2016 began collecting payments via an additional 0.62 percent employer payroll tax on July 1, 2019.
  - Zealous pursuit of payment *and* penalties
- Employees will be eligible to take designated paid family and medical leave starting on July 1, 2020.
- Notice is out. All DC employers are required to post by February 1, 2020.
- *In addition*, must be provided in electronic or physical form to:
  - All employees at least once between February 1, 2020 and February 1, 2021 and at least once a year every following year;
  - All new employees hired after February 1, 2020 at the time of hire; and
  - Individual employees when the employer receives direct notice after February 1, 2020 of the employee's need for leave for an event that could qualify for PFL benefits.

Parental Leave Laws and Policies

- New paid leave statutes are expected, but the trend is away from local—in favor of state level—paid leave laws.
- Hot-button issue again for 2020.
- Challenges for companies with multistate or global operations in designing policies that comply with federal (e.g., Title VII & Pregnancy Discrimination Act) and expanding state or local statutory paid leave laws.
- Virginia might be next
  - Change in complexion of legislature
- Beware stereotypes when drafting own policy



Paid & Parental Leave– COVID Edition

Families First Coronavirus Response Act: The Basics

- Effective April 1, 2020 to December 31, 2020
- Applies to private employers with fewer than 500 employees and most public employers; some restrictions are eased for smaller employers.
- Includes two key leave provisions:
  - Emergency Paid Sick Leave (EPSL) – the Act provides 80 hours of PSL (or 2-week equivalent for part time employees) for certain reasons, paid at either 2/3 or 100% of the employee's regular rate, depending on the reason for leave.
  - Emergency Family & Medical Leave Expansion (EFMLA) – the Act provides for up to 12 weeks of FML for childcare purposes, with 10 weeks paid at 2/3 the employee's regular rate.

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FFCRA: How Much Leave and Reasons For Leave

REASONS FOR LEAVE	PFML	PSL	Rate	Cap
Employee is subject to quarantine or isolation order	No	Yes	Regular rate of pay or minimum wage, if greater per FFCRA	$511/day $5,110 aggregate
Employee was told to self-quarantine by health care provider due to COVID-19	No	Yes	Regular rate of pay or minimum wage, if greater per FFCRA	$511/day $5,110 aggregate
Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis	No	Yes	Regular rate of pay or minimum wage, if greater per FFCRA	$511/day $5,110 aggregate
Employee is caring for an individual who is subject to a quarantine or isolation order, or has been advised to self-quarantine	No	Yes	2/3 regular rate of pay or minimum wage, if greater per FFCRA	$200/day $2,000 aggregate
Son or daughter's school or place of child care is closed due to COVID-19	Yes	Yes	2/3 regular rate of pay or minimum wage, if greater per FFCRA	$200/day (after first 10 days) $2,000 aggregate (PSL) $10,000 aggregate (PFML)
Employee is experiencing other substantially similar condition specified by the Secretary of Health and Human Services	No	Yes	2/3 regular rate of pay or minimum wage, if greater per FFCRA	$200/day $2,000 aggregate

FFCRA: How Much Leave and Reasons For Leave

Reasons for leave covered by one or both of the types of leave available under the FFCRA (all leave must relate to COVID):

- Employee is subject to a quarantine or isolation order;
- Employee was told to self-quarantine by health care provider;
- Employee is experiencing symptoms of COVID and seeking a medical diagnosis;
- Employee is caring for an individual who is subject to a quarantine or isolation order, or has been advised to self-quarantine;
- Son or daughter's school or childcare is closed due to COVID; and/or
- Other substantially similar condition specified by the Secretary of HHS (none have been identified yet)

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FFCRA: Emergency Paid "Sick" Leave (EPSL)

- All employees are eligible.
- The 80 hours of EPSL can be taken only once from April 1, 2020 to December 31, 2020. Even if employees change jobs, they do not receive a new allotment of EPSL.

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FFCRA: Emergency FMLA Leave

- Available to all employees who have been employed for 30 calendar days (unlike “traditional” FMLA, which requires 1 year of tenure).
- EFMLA leave counts towards the employee’s regular 12 weeks of FMLA leave.
- Employees who have used up their FMLA allotment are not eligible for this leave.

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FFCRA: Emergency FMLA Leave

- A qualifying need occurs when an employee is unable to work or telework due to need for leave to care for a son or daughter who is under 18 (or older and incapable of self care due to disability) if, due to COVID:
    - The child's elementary or secondary school or place of care has been closed, or
    - the childcare provider is unavailable (includes summer camps).
- There must be no other suitable person available to care for the child.
- Applies when parents cannot work effectively at home due to the need to care for a child or help with schoolwork.

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Families First Coronavirus Response Act: Exemptions

- There are exemptions for employees of health care providers and first responders.
- Note: the State of New York sued the DOL, claiming the Temporary Rule too broadly interpreted the health care provider exemption. On August 3, 2020, a federal court in New York found in favor of the State, claiming that the DOL's Temporary Rule permits too many health care employees to take FFCRA leave. On September 11, 2020, the DOL issued amendments to the Temporary Rule, effective today (Wednesday, September 16, 2020) narrowing the definitions to those "employed" to provide services "integrated with and necessary to the provision of patient care[.]"

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FFCRA: How Much Leave and Reasons For Leave

- According to the U.S. Department of Labor's Temporary Rule, an employee cannot use FFCRA leave if the employer does not have work available for him or her. As a result, employees taking furloughs are not eligible for FFCRA leave.
- Note: in the State of New York's lawsuit against the Department of Labor, on August 3, 2020, a federal court found that the DOL misinterpreted this part of the FFCRA, and that leave is available to employees even if they are furloughed or there is no work available. The decision is likely to be appealed and, on September 11, 2020, the DOL issued amendments to the Temporary Rule, effective today (Wednesday, September 16, 2020) reaffirming this original position.

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FFCRA: DOL's 9/11 Response to NYS Suit Ruling Regarding Timing of Notice

- DOL and IRS regulations/guidance prescribe the documentation which employers can and should request from employees. These documentation requirements are fairly minimal.
- The FFCRA and the DOL's Temporary Rule provide the amount of notice an employee must give prior to taking FFCRA leave.
  - Now, "Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an Employee takes Paid Sick Leave." Instead, employee must provide the required information to the employer "as soon as practicable" but does not require "prior notice" because that would defeat the purpose of leave.
  - Required information still limited to (1) Employee's name; (2) Date(s) for which leave is requested; (3) Qualifying reason for the leave; and (4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

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FFCRA: Final Thoughts and Analysis

- DOL amendments to Temporary Rule reaffirms that intermittent use of FFCRA leave requires employer consent
  - Similar but not identical analysis for EPSL and EFMLA
- COVID-related leave voluntarily provided by employers before April 1, 2020 does not count towards an employee's FFCRA allotment, although any "traditional" FMLA leave taken before that date would apply towards the employee's 12 weeks of EFMLA.
- Employees needing leave due to childcare normally would use their 80 hours of paid "sick" leave for childcare reasons, then the remaining 10 weeks of EFMLA leave.

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DC Covid Related Leave Laws: Unpaid Leave

COVID Unpaid Leave

- Provides an additional 16 weeks of unpaid, protected leave for
  - Care for Self, Family or Household Member
  - Childcare Closure
- This leave is ***in addition to*** the traditional 16 weeks of family and 16 weeks of medical leave provided by the DCFMLA
- Posted notice required

DC Covid Related Leave Laws: Unpaid (FMLA-type) Leave

COVID Unpaid Leave Eligibility

- ***All*** DC employers covered, regardless of how many employees in the District that the employer employs
- Covered individuals are those who have been employed at least 30 days and work in D.C. or typically work 50% or more of the time in D.C.
- Employees remain covered even if the employee is working from home outside of D.C.
- Right to COVID Leave terminates when the public health emergency has ended, even if an employee has not exhausted the 16-week entitlement.

D.C. Covid Related Leave Laws: Paid Leave

- **Paid Public Health Emergency Leave (PHEL)**
  - Full-time employees: 2 weeks (up to 80 hours) of paid leave
  - Part-time employees: the usual number of hours worked in a 2-week period of paid leave
- **Eligibility**
  - Employer with between 50 and 499 employees, except health care providers
  - Employees who commenced work for the employer at least 15 days before leave request
  - Covered reasons are the same enumerated in the FFCRA

D.C. Covid Related Leave Laws: Paid Leave

- **Rate of Pay**
  - Leave paid at employee's regular rate of pay.
  - If no regular rate of pay, rate of pay determined by dividing total gross earnings (including all tips, commission, or other earnings earned on an irregular basis) for the most recent 2-week period worked, by the hours worked during that 2-week period, BUT rate of pay cannot fall below DC minimum wage.
- **Effect on other leave**
  - Employee may elect to use paid leave concurrently with or after exhausting any other paid leave to which the employee may be entitled

D.C. Covid Related Leave Laws: Paid Leave

- **Effect on other leave, cont'd.**
  - If employee elects to use PHEL paid leave concurrently with other paid leave, employer may reduce the monetary benefit of PHEL paid by the amount of the monetary benefit the employee will receive for paid leave taken under other entitlement
  - If employee elects to use PHEL paid leave after exhausting other paid leave, the employer may reduce the number of hours of PHEL paid leave by the number of hours of paid leave taken under other entitlement
    - Therefore, for most employers, this law does not provide employees with additional leave.
  - If employee uses all PHEL leave available and subsequently informs employer of continued need to be absent from work, employer must inform employee of any paid or unpaid leave to which the employee may be entitled pursuant to federal or District law or the employer's policies.

Payroll Tax Deferral

Executive Order

- On August 8, 2020, President Donald Trump issued the Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster (Executive Order).
- Treasury is directed to defer the withholding, deposit, and payment of the 6.2 percent Social Security tax on certain wages or compensation paid between September 1, 2020, and December 31, 2020, subject to the conditions described below.
- Additionally, the amounts deferred are to be without penalties, interest, or additions to the tax. Treasury is also directed to "explore avenues, including legislation, to eliminate the obligation to pay the taxes deferred pursuant to the implementation of this memorandum."
- Can—and likely should opt out. Cannot be forced to do, even at ee request

Avoiding Legal Pitfalls and Minimizing Legal Risk

Topics

- Laws and regulations impacting COVID compliance
- Liability for COVID illness – employees and others (include releases)
- Workplace safety in the age of COVID – Federal, State and Local Rules and Guidance
- Bringing employees back to work (from home; after furloughs, layoffs)

Topics, cont'd

- Issues around employee screening
- Reasonable accommodation and vulnerable employees (and their family members)
- The "worried well:" when COVID fears keep employees out of work
- What to do when COVID touches your workplace

Laws and Regulations That Can Give Rise to COVID Claims

Potential Sources of Claims by Employees and Others

Federal

Title VII and other laws against national origin, age and other discrimination

Americans with Disabilities Act (ADA)

Occupational Safety and Health Act (OSHA) whistleblower provisions

Section 7 of the National Labor Relations Act (NLRA)

Family and Medical Leave Act

Families First Coronavirus Response Act (FFCRA)

CARES UI provisions

Fair Labor Standards Act (FLSA)

State and Local

Paid Family Leave, Sick Leave and Mini FMLA Guidance

State Disability and Workers' Compensation Guidance

State/Local ADA and anti-discrimination laws

Unemployment Insurance Issues

Predictive Scheduling requirements

Common-law claims like negligence, intentional infliction of emotional distress

Liability for COVID Illness – Employees and Others

Liability to Employees and Others For COVID Illness

- Employees: Normally, an employee would not be permitted to sue employer for illness contracted at work; instead, employee would be limited to worker's compensation remedies ("worker's comp. bar"). State laws determine worker's comp. These laws vary with respect to (1) whether employer gross negligence lifts this restriction and (2) how occupational injury is handled.
- Independent Contractors: ***Not*** covered by worker's comp bar, so they could sue employer for torts like negligence, negligent retention, etc.

Liability to Employees and Others For COVID Illness

- Family members, friends of employees: Would not be covered by worker's compensation bar. Theoretically they could sue employer for torts like negligence, negligent retention, etc. This is untested.
- Visitors to your workplace: Same as family members above; would not be limited to worker's comp remedies; could sue for torts.

Should We Ask Employees For Releases?

Some employers are asking employees to sign releases/ waivers of claims, in order to address these concerns. This generally is inadvisable, because:

- With respect to employee's own claims, employees normally cannot sue. Instead, they are limited to worker's comp remedies, which cannot be waived.
- With respect to claims by family members, employees often lack the authority to release claims belonging to others.
- Courts sometimes view these types of releases as coercive rather than fairly bargained-for, or as lacking "consideration".

Should We Ask Employees For Releases? (Cont.)

- Releases can be viewed as an employer's attempt to avoid its responsibility to provide a safe workplace, as required under OSHA's general duty clause, or an effort to shift workplace safety risks to the employee.
- Releases can pose morale problems and make it even tougher to get employees to come back to work after working remotely.

What *Should* We Do To Help Minimize Risk?

- Study and follow all federal, state and local rules and guidance regarding workplace safety.
- Rules and guidance varies by location and can change rapidly.
- More in the next section.

What About Kids Going Back to School?

- The DOL released a new group of FAQs to provide guidance. Specifically:
- **An employee *may* take FFCRA leave on a child's remote learning days in a hybrid learning method**
  - Some schools are using a "hybrid" or "alternate day" attendance method. Per the DOL, an employee is eligible to take paid leave under the FFCRA on days when the employee's child is not permitted to attend school in person and must instead engage in remote learning.
  - The DOL clarifies that this leave can be taken as long as the employee is actually caring for the child during that time and only if no other suitable person is available to do so.

What About Kids Going Back to School? (cont.)

- **FFCRA leave is *not* available to take care of a child whose school is open for in-person attendance, but the employee *chose* a remote learning option for the child**
  - If a remote learning program was chosen, FFCRA leave is not available because the school is not "closed" due to COVID-19 reasons.
  - However, if, because of COVID-19, an employee's child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, the employee may be eligible to take paid leave to care for the child.
- **If the school year is beginning solely under a remote learning program due to COVID-19 concerns, employees *may* take FFCRA leave**
  - An employee may take paid FFCRA leave while the child's school remains closed and only remote learning is available, because the school is closed in this scenario.
  - However, if the school reopens, whether FFCRA leave is available will depend on the type of reopening, as discussed above.

Virginia's Covid-19-related Emergency Temporary Standard

Occupational Safety and Health Administration (OSHA)

OSHA enforces the Occupational Safety and Health Act generally

- OSHA enforces the federal Occupational Safety and Health Act (the "OSH Act"), 29 USC § 654, which incorporates standards such as
  - 29 CFR § 1910 (General Industry Standards)
  - 29 CFR § 1926 (Construction Standards)
- OSHA also enforces the General Duty Clause:

"Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

29 USC § 654(5)(a)(1).

Virginia Occupational Safety and Health ("VOSH")

Virginia is a "State Plan" state that governs most of its own workplaces

VOSH enforces Virginia occupational safety and health law (Title 40.1) for:

- Most private sector employers
- All state and local employers
- Asbestos removal (including federal workplaces)

OSHA enforces the federal Occupational Safety and Health Act for:

- Federal military facilities
- Federal enclaves where civil jurisdiction has been ceded to federal government
- Temporary employees working for federal government
- Maritime employment (including shipyards, marine terminals, longshoring)
- USPS contractors
- U.S. Department of Energy sites
- Aircraft cabin crew members

VOSH Standard for COVID-19

Virginia passed a first-in-nation COVID-19 standard

- The Virginia Safety and Health Codes Board approves OSHA regulations
- It approved a first-in-the-nation Emergency Standard for COVID-19 on July 15, 2020
- Arose in response to Governor's Executive Orders
- Effective July 27, 2020
- Six-month duration, with potential permanent standard to follow
  - Actually published *the exact same day*! Cut and paste…
- Will "sunset" upon expiration of Governor's State of Emergency

Requirements for All Employers under VOSH Jurisdiction

What Is In the Virginia Standard?

General requirements for all employers

- Hazard assessment for all job tasks ("Very High," "High," "Medium" and "Low")
- Policies/procedures for employees to report COVID symptoms
- Prohibit known/suspected cases at worksites
- "Flexible" sick leave policies
- System to receive reports of positive tests (within past 14 days) by:
  - Employees (including temps and contract employees)
  - Subcontractors
- Mandatory handwashing stations and hand sanitizer "where feasible"
- Employers must assess risk levels of employees and suppliers before entry
- Building and facility owners must notify employer tenants of COVID-19 cases

What Is In the Virginia Standard?

General requirements for all employers (cont'd)

- Employers must notify:
  - VA Dept. of Health of COVID-19 positive tests; and
  - VA Dept. of Labor and Industry (DOLI) of "hot spots"
    - 3 COVID-19 positive tests within a two-week period
- Hazard assessments for all job tasks
- "Good faith" if actual compliance with mandatory/nonmandatory provisions of CDC guidance (if equivalent/greater protection)
- Nondiscrimination for:
  - Raising/reporting concerns
  - Voluntary PPE use
  - Reasonable work refusals

What Is In the Virginia Standard?

These requirements apply to all "Low Hazard" employers with:

- No required contact within 6' of known/suspected cases
- Minimal contact with others (e.g., office setting)
- Minimal contact through engineering controls, such as:
  - Floor-to-ceiling barriers
  - Telecommuting
  - Staggered shifts
  - Remote delivery
  - Mandatory social distancing
  - Face coverings

Requirements for “Medium Hazard” Employers

What is a "Medium Hazard" Employer?

- More than minimal contact within 6' of others
- May include operations/services in:
  - Poultry/seafood/meat processing
  - Agriculture
  - Manual labor
  - Commercial transportation
  - School campuses
  - Daycare/after school care
  - Restaurants/bars
  - Grocery/convenience stores
  - Food banks
  - Drug stores/pharmacies
  - Manufacturing settings
  - Construction (indoor and outdoor)
  - Correctional facilities
  - Work performed in customer premises (homes or businesses)
  - Retail stores
  - Call centers
  - Package processing settings
  - Veterinary settings
  - Personal care, personal grooming, salons and spas
  - Sports venues
  - Homeless shelters
  - Fitness, gym and exercise facilities
  - Airports
  - Train/bus stations
  - Healthcare settings that do not involve exposure to known/suspected cases

Requirements for “Medium Hazard” Employers

- When feasible:
  - Telework
  - Staggered shifts
  - Eliminate personal meetings, travel
  - Physical barriers
  - Implement telework and staggered shifts
  - Social distancing
  - Deliver services/products remotely or by curbside pickup or delivery
  - Reconfigure spaces where employees congregate
- Infectious Disease Preparedness and Response Plan (exception for ten or fewer employees)
  - Designated person for implementation
  - Employee involvement
  - Hazard assessment by job tasks and potential exposure sources
  - Employees with other jobs
  - Employees’ individual risk factors
  - Outbreak contingency plans to cover:
    - Absenteeism
    - Enhanced workplace control measures
    - Cross training/continued operation plans
    - Interrupted supply chains/delayed deliveries

Requirements for “Medium Hazard” Employers

- Prescreening/surveying before each work shift
- Provide face coverings to visitors with suspected cases and employees who can’t social distance
- Infection prevention
  - Handwashing
  - Cleaning/disinfecting
  - Managing/educating visitors
- Identification/isolation of known/suspected cases
- Plan to address subcontractors, temp/contract employee providers, other visitors
- Antiretaliation protections for employees who raise concerns
- Assess, require and communicate PPE use beyond General Industry

Requirements for “Medium Hazard” Employers

- Written certification to verify workplace hazard assessment that:
  - Identifies evaluated workplace
  - Certifies evaluation completion with date(s)
- Ensure air handling systems that:
  - Are maintained according to manufacturers’ instructions
  - Comply with minimum American National Standards Institute (ANSI)/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standards
- Employee COVID training within 30 days on:
  - New VOSH standard
  - CDC guidelines (mandatory and nonmandatory)
  - Signs/symptoms/methods of transmission
  - Risk factors for underlying health conditions
  - Asymptomatic/Presymptomatic spread
  - Safe and healthy work practices
  - PPE
  - Antidiscrimination
  - Infectious Disease Preparedness and Response Plan
  - Retraining

The New Virginia

Virginia Passed a *Bunch* of Laws!

- "Nondisclosure or Confidentiality Agreements; Sexual Assault, Condition of Employment" (Va. Code § 40.1-28.01)
  - Employers may not require job applicants or current employees to execute nondisclosure agreements that would conceal the details of any "sexual assault" claim an employee may have against the employer.
  - "Sexual assault" is not defined. However, the statute applies to claims arising under Virginia laws on rape (Va. Code § 18.2-61), forcible sodomy (§ 18.2-67.1), aggravated sexual battery (§ 18.2-67.3), and sexual battery (§ 18.2-67.4).
  - Does not restrict nondisclosure or confidentiality agreements with former employees.
- Amended the Virginia Wage Payment Act (VA Code 40.1-29) to create a private right of action for employees in Virginia to sue their employers for allegedly unpaid wages.
  - Court may award wages owed, liquidated damages (double damages for all violations and treble damages for "knowing violations"), 8% prejudgment interest, reasonable attorneys' fees and costs, civil penalty of up to $1,000 per violation
  - 3 year statute of limitations with potential for individual, joint, or collective actions.

Virginia Passed a *Bunch* of Laws (cont.)

- New Restrictive Covenant Law
  - "No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee."
    - Moving target
    - Drafting implications
  - A *"covenant not to compete"* shall not restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client.
    - Note: This language appears in the definition section!
- New Pay Transparency Law
  - Prohibits employers from discharging or taking any other retaliatory action against an employee for discussing wages or compensation with another employee.
  - Not for HR…
  - Check your handbook!

Worker Misclassification – Are There Independent Contractors Anymore?

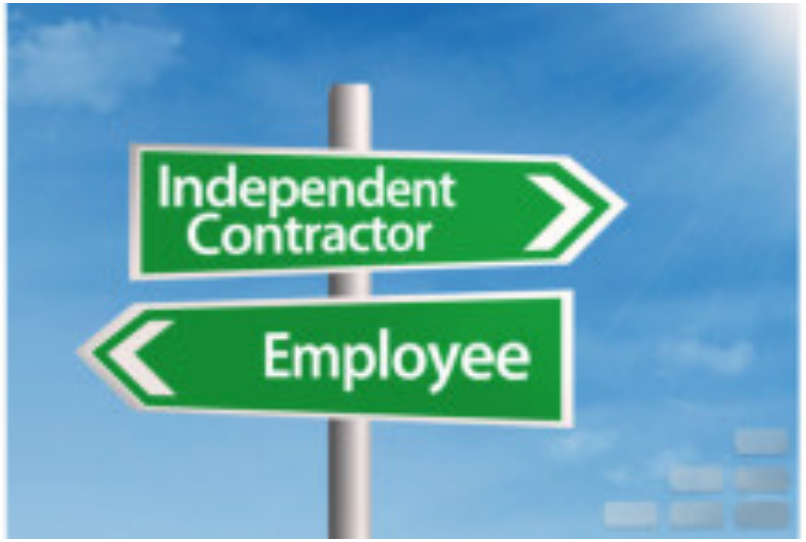
Dynamex Operations West Inc. v. The Superior Court of Los Angeles County

- California Supreme Court decision with strong implications for the gig economy.
- Three-pronged standard — called the ABC test — that *presumes* workers are employees (not independent contractors) and ditched the more flexible classification test that had been in use for almost three decades.
- To overcome the employee presumption, test makes businesses show workers are:
  - free from supervision;
  - perform work that is outside the usual course or place of business; and.
  - work "in an independently established trade, occupation, or business of the same nature" as the work they do for the entity that is hiring them.

California Made it a Law

- California's A.B. 5's asserted aim is at the "gig" economy and alleged misclassification of individuals who perform work for their companies as independent contractors but impact are much more wide spread
- Codified and expanded the three-prong ABC test from *Dynamex*
- Under the test, an employer can only classify workers as independent contractors if it shows each of three things: that the workers are free from their hiring entity's control, work outside its "usual business" and "customarily" do the work they do for their alleged employer as part of an "independent business."

Then Virginia Did Too…



- HB 984/SB 894: Cause of Action
- HB 1199/SB 662: Retaliatory Actions Prohibited; Civil Penalty
- HB 1407: Department of Taxation to Investigate and Enforce; Civil Penalties
- HB 1646: Board for Contractors

Private Cause of Action (VA Code § 40.1-28.7:7)

- An individual not properly classified as an employee can bring a civil action for damages.
- Presumption that an individual performing services for renumeration is an employee of the person that paid such renumeration and the person paying the remuneration is the employer of the individual who was paid for performing the services, unless it is shown that the individual is an independent contractor as determined under the IRS guidelines.
- Court may award: Damages in the amount of any wages, salary, *employment benefits*, or other compensation lost to the individual; Reasonable attorneys' fees, and costs incurred.
- Opens the door for class actions.

Prohibiting Retaliation Against Employees (VA Code § 40.1-33.1)

- Unlawful for an employer to discharge, discipline, threaten, discriminate against, or penalize an employee or independent contractor, or take other retaliatory action because s/he:
  - Has reported or plans to report to an appropriate authority that an employer failed to properly classify an individual as an employee and failed to pay required benefits or other contributions; or
  - is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.
- Protection only if disclose information in good faith and upon reasonable belief.

Takeaways

- Audit to identify employees that may be misclassified as independent contractors.
- Review employment agreements and service contracts.

Marijuana

Virginia's Newest Marijuana Laws exceed DC and MD

Marijuana possession decriminalized, but still *not* legal

Civil penalty of no more than $25 for possession of up to an ounce of marijuana, with no jail time. (Is/was misdemeanor with first offense maximum fine of $500 and 30-day jail sentence or both)

Industrial Hemp products (e.g., CBD Oil) OK with low THC

Restrictions on asking about marijuana convictions

An employer or educational institution shall not, in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning any arrest, criminal charge, or conviction against him when the record relating to such arrest, criminal charge, or conviction is not open for public inspection [].

Who is a Whistleblower?

Dodd-Frank Whistleblowers - Revisited

- Unanimous Supreme Court in *Digital Realty Trust, Inc. v. Somers* found the Dodd-Frank anti-retaliation provision protects *only* those employees who complain directly to the SEC.
  - Potential danger for employers because external report now *must* occur (in addition to bounty provisions…)
- Bipartisan legislation passed in House and introduced in the U.S. Senate define "whistleblower" under Dodd-Frank's anti-retaliation provision as an individual who reports internally to certain categories of people (e.g., those with supervisory authority or authority to investigate misconduct).
  - Possible catch, Senate version would prohibit arbitration of Dodd-Frank whistleblower claims.

Virginia's New Whistleblower Law

Protected conduct by employee (or person acting on behalf of employee) includes:

- Reporting in good faith a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official;
- Being requested by a governmental body or law enforcement official to participate in an investigation, hearing, or inquiry;
- Refusing to engage in a criminal act that would subject the employee to criminal liability;
- Refusing an employer's order to perform an action that violates any federal or state law or regulation when the employee informs the employer that the order is being refused for that reason; or
- Providing information to or testifying before any governmental body or law enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

Virginia's New Whistleblower Law

- Is **very broad** – any perceived violation of any federal or state law.
- Unlike federal whistleblower which is tied to specific violations or statutes.
- Previous state relief:
  - Common law wrongful discharge/*Bowman* claims limited to terminations that were in violation of public policy contained in Virginia statutes (not federal statutes).
- No exhaustion requirement.
- Straight to state court within 1 year of the prohibited retaliatory conduct.
  - Difficult to get summary judgment.
- Successful whistleblower can obtain:
  - Injunctive relief;
  - Reinstatement to the same or an equivalent position; and/or
  - Compensation for lost wages, benefits, and other remuneration, together with interest, as well as reasonable attorneys' fees and costs.
    - **UNCAPPED**.

What are the Courts up to?

Lamps Plus, Inc. v. Varela

- In 2018, *Epic Systems* provided significant incentive to use class action waivers in arbitration agreements as a tool for limiting their exposure to potential collective claims from workers.
- 5-4 U.S. Supreme Court decision : “Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a class wide basis.”
- Even with a strong Federal Arbitration Act, “Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement.”
- Arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

Bostock v. Clayton County, Georgia (June 15, 2020)

- **Title VII covers sexual orientation and gender identity discrimination**
  - Consolidated appeal. Underlying cases were:
    - *Altitude Express Inc. v. Zarda*—skydiving company challenging a Second Circuit decision reviving a gay ex-instructor's unfair firing claims;
    - R.*G. & G.R. Harris Funeral Homes v. EEOC*—mortuary appealing funeral director claims of being fired after announcing her gender transition; an,
    - *Bostock v. Clayton County—M*unicipal worker seeking to overturn loss after claiming he was fired after Clayton County found out he was part of a gay softball league.
  - The majority first considered what was meant by "sex" and "discriminate" in 1964 and concluded that the interpretation in 1964 is the same as in the present day.
- Evolving legal issues show varying definitions of the term "sex":
  - Sex stereotyping
  - Same sex harassment
  - Parental status

Majority Opinion – "But For" Standard

- Court applies a "but for" standard because "[t]he question isn't just what 'sex' meant, but what Title VII says about it."
- The Court notes:
  - Title VII explicitly prohibits discrimination "because of" a protected characteristic which "incorporates a 'simple' and 'traditional' but for causation standard"
  - "An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision.
  - "For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."

On the horizon…

- **Tech Tweaks to Old Laws**

  Class action accusing businesses including T-Mobile and Amazon.com of discriminating against older job applicants by advertising openings on Facebook and limiting their audience to younger workers.
- Theory is web ads are just like the targeted newspaper listings and help-wanted posters of old that discrimination laws like Title VII sought to prevent
- Jurisdictional challenges (N.D. Cal for all?)
- How do you prove you would have responded to an ad you never saw?

What is Protected by Anti-Discrimination Laws?

Big Changes For Virginia Became Effective July 1, 2020

- Terms “because of race” or “on the basis of race” now include traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists.
- Expanded the definitions to cover unlawful discrimination on the basis of pregnancy and childbirth.
  - Requires employers to make reasonable accommodation for “known limitations” related to pregnancy, childbirth, or related medical conditions, absent undue hardship.
  - Prohibits adverse action for requesting/using a reasonable accommodation or denying employment/promotion because reasonable accommodation necessary.
- Explicit prohibition on discrimination in employment and housing on the basis of sexual orientation and gender identity
- Adopts “motivating factor” standard for any employment practice (i.e., even if other factors).

The Virginia Values Act – Virginia Quirks & Implications

- Virginia state courts are now—for the first time—an attractive and obvious place for employees to sue Virginia employers.
- Plaintiffs' firms likely to entirely forego federal discrimination claims in favor of Human Rights Act claims (Rocket Docket, removal).
- Are courts ready for possible influx?
- Quirks to obtaining summary judgment in employment cases litigated in Virginia state courts.
- Impacts on the "value" of a matter—demand letter, charge, or suit.
- Handbook updates.
- Arbitration policy?
- Jury waivers?

Before *Bostock* State Law Protections

- **22 states** (CA, CO, CT, DE, HI, IL, IO, ME, MD, MA, MN, NH, NV, NJ, NY, NM, OR, RI, UT, VA, VT and WA) and D.C. include **gender identity and/or gender expression** in their employment non-discrimination statutes.
- **23 states** (CA, CO, CT, DE, HI, IL, IO, ME, MD, MA, MN, NH, NJ, NM, NV, NY, OR, RI, UT, VA, VT, WA, WI) and D.C. explicitly prohibit **sexual orientation** discrimination.
- Other states prohibit sexual orientation discrimination in public employment only. Courts in some of those states have interpreted state antidiscrimination laws as covering sexual orientation discrimination.

What's Next After *Bostock*?

- Impact on State, Local Law
- Transgender Medical Coverage
- Religious Exemptions
- Title IX Sports
- Title IX Housing
- Affordable Care Act
- Restroom and Locker Room Usage
- Gender Non-Binary Designations
- Sex Segregation
- Impact On Private Employers

Q&A

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Thank you.

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